



COMMONWEALTH OF MASSACHUSETTS  
EXECUTIVE OFFICE OF ENERGY & ENVIRONMENTAL AFFAIRS  
**DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
**NORTHEAST REGIONAL OFFICE**

205B Lowell Street, Wilmington, MA 01887 • (978) 694-3200

DEVAL L. PATRICK  
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CERTIFIED MAIL

May 2, 2007

Richard A. Nylén, Esq.  
Lynch DeSimone & Nylén, LLP  
12 Post Office Square  
Boston, Massachusetts 02109

Re: NEWBURYPORT - Solid Wastes/COR  
Crow Lane Landfill  
Force Majeure – Tarp Placement  
Denial  
FMF No. 39545

Dear Attorney Nylén:

The Massachusetts Department of Environmental Protection, Northeast Regional Office, Bureau of Waste Prevention, Solid Waste Management Section ("MassDEP") and the Office of the Attorney General are in receipt of your letter dated April 27, 2007. Your letter references the Force Majeure provisions of paragraph 16 of the Order and informs MassDEP that New Ventures, LLC ("New Ventures") is experiencing problems keeping and maintaining tarps on inactive areas of the Crow Lane Landfill in Newburyport, Massachusetts in compliance with the requirements of paragraph 1 (j) of the Preliminary Injunction entered on October 20, 2006 in *Commonwealth of Massachusetts v. New Ventures Associates, LLC*, Suffolk Superior Court, Civil Action No. 06-0790 C (the "Order") as amended by order of the Court on November 1, 2006 and February 22, 2007. Your letter states that gale force winds that have hit the site on at least four (4) occasions, resulting in tarp damage, dislocation and loss. As you know, on November 1, 2006 MassDEP approved a Force Majeure extension to return to compliance with the tarp placement requirements of paragraph 1 (j) based on at least one of these past extraordinary high wind events. However, because of these past problems, your letter appears to request that MassDEP allow a Force Majeure extension of the time by which New Ventures must return to compliance



with all of the paragraph 1 (j) tarp placement requirements pending the Department's acting on New Ventures' request that the Order be amended to allow soil to be used in place of tarps.

As you know, paragraph 1 (j) of the Order requires that New Ventures completely cover with impervious tarps, in accordance with the performance standards in Appendix B: "Tarp and Poly Sheet Placement Protocol" of the Order, all areas of the landfill containing construction and demolition waste fines and residual materials (C&D), with the exception of areas that in the past twenty four hours have undergone filling, grading, shaping, or Geocomposite gas collection system installation activity, which areas shall be covered at all times when no work on that area is in progress using removable, impervious tarps or poly sheeting at least 11 millimeters thick. The tarp placement protocol in Appendix B of the Order requires that the tarps be securely held in place using sand bag and/or tires (weights). Appendix B further requires that the tarps be inspected daily for damage and to determine whether they are securely held in place and that damaged tarps be replaced and additional soil and weights be placed as necessary to hold the tarps in place.

During inspections of the Site, MassDEP representatives have repeatedly observed ripped and displaced tarps and informed New Ventures personnel on numerous occasions of the need to replace, repair and secure these tarps. In addition, on numerous occasions during inspections of the site, including on November 7, 2006, MassDEP personnel suggested to New Ventures' representatives that New Ventures use tires roped together in a net pattern to secure the tarps. Despite these notifications, New Ventures has not placed sufficient soil and/or weights as necessary to secure the tarps, resulting in frequent tarp damage and dislocation, with portions of the landfill not meeting the tarps placement requirements of paragraph 1 (j) and Appendix B of the Order.

Your letter seeks MassDEP's approval to substitute the tarp placement requirements of paragraph 1 (j) of the Order with provisions that six (6) inches of soil be used as cover on all inactive portions of the landfill instead of tarps. This request was also contained in a letter dated April 25, 2007 that you submitted to MassDEP in response to the Unilateral Administrative Order, File No. UAO-NE-07-4003, (the "UAO") that the MassDEP issued to New Ventures on April 12, 2007. Your April 25, 2007 letter described the four point litter control plan ("Plan") that New Ventures proposed to implement at the site to control litter, and included a proposal to substitute a minimum of six (6) inches of soil cover for the tarps.

In addition to controlling wind blown litter, tarp placement required by paragraph 1 (j) is necessary to minimize the infiltration of precipitation into C&D, thus reducing leachate generation, leachate breakouts, generation and releases of landfill gas, and the associated odors. The MassDEP does not believe that soil cover alone, as proposed by New Ventures, will achieve this result. Therefore, by separate letter, the MassDEP has approved the proposed litter control plan subject to a number of conditions including that New Ventures must continue to place the tarps in the inactive areas as required by paragraph 1 (j) of the Order.

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MassDEP and the Office of the Attorney General have reviewed your Force Majeure request pursuant to paragraph 16 of the Order and hereby deny it. The request does not comply with the paragraph 16 requirement that any Force Majeure request be made within 72 hours of the time New Ventures knew or should have known that an event or events would cause a delay in compliance, followed by a written notice within five days of the event or events of fully describing, *inter alia*, the measures taken to prevent, minimize or avoid the delay. As noted above, MassDEP personnel have on numerous occasions informed New Ventures that additional steps should be taken to securely anchor the tarps to prevent loss or damage from high winds. Although New Ventures has taken some measures to weight down tarps in anticipation of storm events, New Ventures has not placed sufficient soil and/or weights to securely anchor the tarps at the Site. Moreover, any general claim that tarp placement is difficult to maintain does not satisfy the requirements of a Force Majeure request pursuant to paragraph 16 of the Order. Periodic difficulty keeping tarps secure in the face of occasional high wind events does not present a situation beyond New Ventures' control that "could not have been prevented, avoided, or minimized by the exercise of due care by New Ventures or its employees, agents, contractors, or subcontractors." (See paragraph 16 of the Order). Furthermore, normal inclement weather including the occasional occurrence of high winds is not a Force Majeure event under paragraph 16.

New Ventures shall immediately undertake all measures necessary to comply with the Order including, without limitation, all paragraph 1(j) tarp placement requirements.

If you have any questions please contact me at (978) 694-3299.

Sincerely,

**This final document copy is being provided to you electronically by the  
Massachusetts Department of Environmental Protection.  
A signed copy of this document  
is on file at the DEP office listed on the letterhead.**

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John A. Carrigan, Chief  
Solid Waste Management Section

Certified Mail Number: 7005 1820 0007 7732 1947

JAC/MI/jac

Cc: John Morris, Director  
Health Department  
City of Newburyport  
60 Pleasant Street  
Newburyport, MA 01950

Email Address: JMorris@CityofNewburyport.com

Matthew Ireland  
Office of the Attorney General  
Boston, MA

Traci Peters  
City of Newburyport  
Conservation Commission  
60 Pleasant Street  
Newburyport, MA 01950  
Email Address: tpeter@cityofNewburyport.com

William Thibeault, President  
New Ventures LLC  
85-87 Boston Street  
Everett, Massachusetts 02149  
Email Address: tuppenney@comcast.net

Michael Quatromoni  
SITEC Environmental, Inc.  
769 Plain Street, Unit C  
Marshfield, MA 02050

Senator Steven A. Baddour  
State House  
Boston, Massachusetts  
Email Address: SBaddour@senate.state.ma.us

Representative Michael A. Costello  
State House  
Boston, Massachusetts  
Email Address: Rep.MichaelCostello@hou.state.ma.us

Tom and Terry Berns  
Newburyport, Massachusetts  
Email Address: [tjbty@comcast.net](mailto:tjbty@comcast.net)

Jack Van Loan  
Plum Island  
Newburyport, Massachusetts  
Email Address: jackvanloan@earthlink.net

Newburyport

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New Ventures Associates, LLC (aka Crow Lane Landfill

Force Majeure – Denial

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Ronald Klodenski  
Newburyport, Massachusetts  
Email Address: [ronklod@verizon.net](mailto:ronklod@verizon.net)

William Woodbury  
Newburyport, Massachusetts  
Email Address: [william.woodbury@verizon.net](mailto:william.woodbury@verizon.net)

Bruce Vogel  
City of Newburyport  
City Council  
Email Address: [wardfive@comcast.net](mailto:wardfive@comcast.net)

Michael Dingle  
MassDEP/OGC-Boston